UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOSPITAL MENONITA DE GUAYAMA, INC.

and

UNIDAD LABORAL DE ENFERMERAS(OS)
Y EMPLEADOS DE LA SALUD

Cases: 12-CA-214830, 12-CA-214908, 12-CA-215039, 12-CA-215040, 12-CA-215665, 12-CA-217862, 12-CA-218260, and 12-CA-221108

GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO CROSS EXCEPTIONS

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Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the General Counsel (CGC) files the following Reply Brief to Respondent's Answering Brief to Cross-Exceptions. Counsel for the General Counsel's Answering Brief to Respondent's Exceptions and Brief in Support of Cross-Exceptions fully address all other contentions raised by Respondent in its Answering Brief that are not addressed here.[1]

I. A finding that Respondent's withdrawals of recognition were unlawful because they occurred at times when significant unremedied unfair labor practices existed would not violate Respondent's due process

In its Answering Brief, Respondent argues -for the first time- that the General Counsel (GC) should be barred by due process from arguing that Respondent's withdrawals of recognition were unlawful because they occurred at times when unremedied unfair labor practices existed (hereinafter *GC's Master Slack/Lee Lumber* theory).[2] To support this contention, Respondent argues that the GC is attempting "to change its theory in midstream without giving Respondent reasonable notice" and accuses the GC of wanting "a presumption to be imposed and a ruling that Respondent was unable to rebut the presumption without being first notified of its existence." [R. A. Br. page 16].[3] There is no merit to Respondent's argument. The Board's Rules and Regulations require only that the complaint include "a clear and concise description of the acts which are claimed to constitute unfair

[1] The Respondent's Answering Brief is missing pages 19 and 20. This Reply Brief is in response to the pages the GC received. All arguments in pages 19 and 20 cannot be addressed and should be deemed objected by CGC.

[2] General Counsel's full argument in this regard is contained in Section III-B of General Counsel's Brief in Support of Cross-Exceptions and Section III-F (ii) of General Counsel's Answering Brief to Respondent's Exceptions.

[3] As used herein, the numbers following "ALJD" refer to the page and line number of the Administrative Law Judge's Decision, and those following "Tr." refer to the page and line numbers of the transcript. In addition, "GCX." refers to General Counsel's exhibits, "R Ex." refers to Respondent's exhibits, "JX" refers to Joint exhibits.

labor practices," not that it includes the legal theory relied on. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993), citing 29 C.F.R. 102.15. In addition, due process "does not require a precise statement of the theory upon which the GC intends to proceed under the Act, with the threat that failure of precision in pleading will require the GC to re-try the case." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990). Rather, in the context of the Act, due process is satisfied where the complaint gives notice "of acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated." *Pergament*, 920 F.2d at 134.

Here, the Complaint gave notice of the specific conduct that constituted unfair labor practices, by alleging that Respondent's withdrawals of recognition in all five units constituted a failure and refusal to bargain collectively with the exclusive representative of its employees, in violation of Section 8(a)(1) and (5) of the Act. These allegations in the Complaint were adequate and constituted enough notice to allow GC to advance its *Master Slack/Lee Lumber* theory without violating Respondent's due process rights. The GC did not have an obligation to state all possible theories of the Section 8(a)(5) violations in the Complaint, nor to instruct Respondent's Counsel regarding the applicable caselaw and corresponding presumptions. Rather, Respondent had the responsibility of "investigating the basis of the complaint and fashioning an explanation of events that refuted the charge of unlawful behavior." *See Pergament*, 920 F.2d at 135 (citations omitted).

The GC provided Respondent with adequate notice of its legal theory, not only in the Complaint, but also during the hearing itself. In this respect, during the opening statement, when arguing that Respondent's withdrawals of recognition were unlawful, CGC asserted -in relevant part- that "…these withdrawals of recognition came about in an

atmosphere of unremedied unfair labor practices." [Tr. pages 32-33]. What is more, when CGC objected Respondent's attempt to introduce evidence regarding loss of majority support, it was clarified that this objection should not be construed as a waiver of the GC presenting other arguments, including *that Respondent withdrew recognition while there were unremedied unfair labor practices and in an atmosphere of Respondent's bad faith towards the Union, and that this caused any potential loss of support*. (Our emphasis). [Tr. Pages 211-213]. Furthermore, the Complaint clearly alleges that Respondent failed and refused to meet and bargain with the Union since at least before it withdrew recognition from most of the bargaining units.

Nothing in the Act bars the GC from arguing a violation under more than one theory, so long as Respondent is provided with adequate notice of the alleged violations. See *Eagle Express Co.*, 273 NLRB 501, 503 (1984). Here, Respondent cannot realistically claim that it was denied adequate notice and an opportunity to respond to the CGC's *Master Slack/Lee Lumber* argument. As outlined herein, this theory of the violation was undoubtedly encompassed within the 8(a)(5) allegation of the Complaint and was also fully disclosed by the GC since the beginning of the hearing. Furthermore, both at trial and in its briefs to the ALJ and the Board, Respondent raised substantial defenses to each of the alleged unfair labor practices under which the GC's *Master Slack/Lee Lumber* theory is premised. Thus, there can be no question that the matter was fully litigated. In view of the above, Respondent's contention that its due process would be violated if the Board were to consider the GC's arguments is both meritless and disingenuous; thus, it should be disregarded by the Board.

II. If the Board were to overrule the successor bar doctrine, Respondent's Rejected Exhibits should still be inadmissible under the GC's *Master Slack/Lee Lumber* theory. In the alternative, the Board should remand the case to the ALJ.

In its Answering Brief, Respondent appears to be arguing that, if the Board decides to overrule the successor bar doctrine outlined in *UGL UNICCO Service Co., 357 NLRB 801 (2011),* then it should reverse the ALJD and find that all withdrawals of recognition and subsequent unilateral changes were permissible under the Act. Respondent's argument is severely flawed.

First, as fully argued by the GC in its Brief in Support of Cross Exceptions and Answering Brief to Respondent's Exceptions, the ALJ's rejection of Respondent's evidence of alleged loss of Union support was appropriate even if the Board were to determine that *UGL-UNICCO* should be overruled. If Respondent had been allowed to introduce the purported disaffection evidence, it would have made no difference to the outcome of the case. Settled Board law precluded Respondent from relying on this evidence, since it arose after Respondent unlawfully refused to bargain with the Union and engaged in additional unfair labor practices, all of which remain unremedied to date.[4] As discussed above, this theory of the violation is encompassed within the Complaint and was fully disclosed and litigated.

Second, in the event the Board were to determine that the GC's *Master Slack/Lee Lumber* theory of the violation does not support an exclusion of the purported disaffection evidence, then, the appropriate course of action (if the Board, over the GC's contention, determines that Respondent's met its burden with its Offer of Proof)

[4] CGC's argument in this matter is outlined in Section III-B of General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision, and Section III-F (ii) of General Counsel's Answering Brief to Respondent's Exceptions.

would be to remand the case to the ALJ for further development of the record, rather than reversing it at the appellate level. Respondent argues that "[t]he GC does not contest that at all relevant times the Union lacked majority support" and that its purported disaffection evidence "would surely have sufficed to reverse the rebuttable presumption of majority status…" [R. A. Br pages 1 and 6]. Respondent's arguments are false and unfounded. At no time did the GC concede that Respondent's alleged disaffection evidence demonstrated an actual loss of majority support. As noted in the opening statement, the GC's position is that Respondent withdrew recognition without having objective evidence of actual loss of majority support. [Tr. Pages 211-213]. In view that the ALJ rejected Respondent's alleged disaffection evidence based on another CGC theory, the GC did not have an opportunity to confront this evidence. As noted, at the hearing, CGC clarified that the objection to the introduction of any evidence regarding loss of majority support should not be construed as a waiver of the GC presenting other arguments, including that Respondent withdrew recognition without evidence of actual loss of majority support, among others. It was also made clear that Respondent's Rejected Exhibits and Respondent Counsel's description of the same, in no way formed part of the record, since such documents had not been authenticated, and CGC and the Union did not have an opportunity to conduct any rebuttal. [Tr. pages 211-213]. Under these circumstances, Respondent's Offer of Proof should not be treated as substitute of record evidence and Respondent's reliance on such evidence, that is not in the record, should be rejected.

III. Respondent's argument that it recognized the Union sometime in September or October 2017 is misguided and unsupported by the record

Respondent asserts that it recognized the Union "sometime during the end of

September to first week of October 2017," without being able to identify a specific date when this purported recognition took place. [R. A. Br. page 10]. Despite having excepted to the ALJ's finding that "not until November 6, 2017 the Respondent notified the Union it was recognizing it as the exclusive representative of employees in all five units," Respondent now argues that the ALJ never found that Respondent recognized the Union on November 6, 2017. [Respondent's Exception #17]. Respondent further contends that "everyone understood that the November 6, 2017 letter was just the formal relay of what had been verbally communicated to the Union during the last week of September to the first of October 2017." [R. A. Br. page 11]. Respondent's arguments are simply unfounded because by October 9, 2017, the Union sent a text message to Respondent inquiring over the status of the Union's recognition. [JX 14].

The GC's position and substantiating evidence regarding Respondent's delay in recognizing the Union and the practical effects of the same are fully outlined in its previous briefs to the Board. However, CGC wishes to clarify a disingenuous misrepresentation made by Respondent about the General Counsel's Brief in Support of Cross-Exceptions. In this respect, Respondent asserted that CGC misled the Board when it argued "that on September 18 and 19, and on October 4 and 13, Respondent sent letters to the Union stating that it still needed to determine whether the Union represented a majority of employees before recognizing the Union." Respondent asserts that by making this statement, the GC falsely represented that there were different letters, instead of a single letter which was re-sent on multiple dates. [R. A. Br. page 12]. Respondent's allegation is deceiving, as it merely cites a portion of GC's brief outside of context. In the Facts portion of its Answering Brief to Respondent's

Exceptions (incorporated by reference to GC's Brief in Support of Cross-Exceptions), CGC clearly explained that the letters which Respondent sent to the Union on September 19 and October 4 and 13, 2017 were copies of the refusal to recognize letter originally sent by Respondent on September 18, 2017. [General Counsel's Answering Brief to Respondent's Exceptions, pages 6-7].

In any event, and as argued by the CGC in previous briefs, the fact that Respondent sent the same refusal to recognize letter to the Union on various dates from September 18 to October 13, 2017, asserting that it needed more time to determine whether it had a legal duty to recognize the Union, coupled with Respondent's other actions, undeniably proves that Respondent had not recognized the Union during said period. Furthermore, Respondent's contention that the letter was re-sent on the above dates only because Union Representative Echevarria so requested is misguided and has no basis on the record evidence. The *only* instance when Echevarria requested a copy of the letter was when he sent a text message to Respondent's HR Manager around October 9, inquiring about the status of the Union's recognition and the HR Manager responded by asking him whether he had received Respondent's refusal to recognize letter. [JX 14, page 4]. Instead of weighing in favor its assertion that it had recognized the Union sometime in September or October 2017, Respondent's reliance on this conversation only serves to highlight the fact that Respondent had not recognized the Union by the time of this exchange. Had Respondent recognized the Union by then, it would have confirmed so in writing, as it did on November 6, instead of inquiring whether the Union had received the refusal of recognition letter. Other than the above, the record is devoid of any evidence to support Respondent's claim that said letter was

sent on those dates per the Union's request.

IV. Contrary to Respondent's contentions, at no time did Respondent engage in good faith bargaining with the Union

In a further attempt to justify its unfair labor practices, Respondent argues that it never refused to meet and bargain with the Union prior to withdrawing recognition in all units. Respondent argues that "from September 13, 2017 to February 7, 2018 the Union never asked to meet and bargain concerning the initial terms of collective-bargaining agreement." [R. A. Br. Page 16]. Respondent further asserts that its conditioning of face-to-face bargaining upon submission of the Union's proposals did not constitute a refusal to bargain. [R. A. Br. Page 17]. Respondent's legal conclusions and the arguments in which they are premised are both legally and factually incorrect.

First, contrary to Respondent's claim, the Union *did* make timely requests to bargain during the period from September 13, 2017 to February 7, 2018 which Respondent ignored. The record clearly reflects that, on September 13, 2017, the Union requested recognition and asked that Respondent provide it with certain information, which was not provided until after November 6, 2017. [JX. 12(a)]. Later, on October 12, 2017, Union Representative Ariel Echevarria, by text message, unsuccessfully requested that Respondent meet and bargain with the Union. [JX 14(a), page 5]. Thus, Respondent's claim that the Union never requested to meet and bargain during such period is simply untrue. Even after Respondent recognized the Union on November 6, 2017, it continued refusing to bargain with the same, by making further unilateral changes to unit employees' terms and conditions of employment and by refusing to engage in face-to-face bargaining over a collective-bargaining agreement in all five units.

Second, the record is clear in that, since the beginning, Respondent conditioned

face-to-face bargaining upon the submission of the Union's written proposals. Furthermore, on February 7, 2018, Respondent blatantly informed the Union that it would coordinate collective-bargaining meetings only *after* it had received and analyzed the Union's written proposals. Although Respondent does not appear to contest these facts, it wrongly alleges that they did not constitute a refusal to bargain. [R. A. br. page 17]. Notably, Respondent did not cite any legal framework in support of this flawed contention. As fully argued by the CGC in its previous briefs to the Board, Respondent had a duty to meet in person with the Union. This duty was not satisfied by merely countering with a further request for the Union to submit its proposals in writing. The fact that Respondent was analyzing the Union's proposal and preparing its counterproposal did not excuse Respondent from its obligation to make itself available to *meet at reasonable places and times* with the Union for the purpose of collective-bargaining. In this sense, Respondent's proposition that it had no obligation to meet face-to-face with the Union before February 12, 2017, when the Union submitted its proposal, is unreasonable and unsupported by Board law and clearly proves the alleged violation. Furthermore, Respondent unilaterally determined that, it had no obligation or need to meet with the Union before receiving, analyzing and responding to the Union's proposal. Respondent's contention, if allowed, would defeat the purposes of the Act regarding the obligations imposed upon the parties to a bargaining relationship.

Finally, Respondent's assertion that it continued to meet with the Union to discuss all matters related to unionized employees that were brought by the Union is untrue and unsupported by the evidence. [R. A. Br. page 13]. The only meetings held between the parties during all relevant times were the ones on October 20 and 27, 2017,

when Respondent had not even recognized the Union. As stipulated by the parties, during these meetings, the discussion was centered in the schedule of employees in the RN Unit. At the October 27, 2017 meeting, when the Union attempted to discuss additional terms and conditions of employment affecting all unit employees, Respondent simply countered with a request that the Union put its proposal in writing. [JX 1, page 9, paragraph 46]. Respondent maintained this bargaining stance during the remaining life of its relationship with the Union, conditioning any potential bargaining upon submission of the Union's written proposals. Based on the foregoing, and the arguments presented by CGC in its briefs, Respondent's assertion that it engaged in good faith bargaining should be rejected.

V. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board grants the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge. General Counsel further requests that the Board issue an order otherwise affirming and adopting the Decision and Recommendations of the ALJ.

Dated at San Juan, Puerto Rico this 6th date of November 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO CROSS EXCEPTIONS in the matter of Hospital Menonita de Guayama, Inc., Cases 12-CA-214830, 12-CA-214908, 12-CA-215039, 12-CA-215040, 12-CA-215665, 12-CA-217862, 12-CA-218260, and 12-CA-221108, was electronically filed with the Executive Secretary of the National Labor Relations Board and served by electronic mail upon the below listed parties on this 6th day of November 2019, as follows:

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